87-1621

No.

Supreme Court, U.S.
FILED
MAR 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES INTERNAL REVENUE SERVICE
AND BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE, PETITIONERS

v.

SUSAN B. LONG AND PHILIP H. LONG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, despite the prohibition on disclosure of tax "return information" in 26 U.S.C. 6103, "check sheets" prepared by the Internal Revenue Service, which list information taken from particular taxpayers' tax returns and audits, must be redacted of identifying information and disclosed to the public in response to a Freedom of Information Act request.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

UNITED STATES INTERNAL REVENUE SERVICE
AND BUREAU OF ECONOMIC ANALYSIS,
UNITED STATES DEPARTMENT OF COMMERCE, PETITIONERS

v.

SUSAN B. LONG AND PHILIP H. LONG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States Internal Revenue Service and the Bureau of Economic Analysis, United States Department of Commerce, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-12a) is reported at 825 F.2d 225. The oral ruling of the district court in 9th Cir. Nos. 86-3678 and 86-3679 (App., *infra,* 17a-20a) is unreported. The opinion of the district court in 9th Cir. No. 84-4117 (App., *infra,* 21a-29a) is reported at 566 F. Supp. 799, but the court's findings of fact and conclusions of law (App., *infra,* 30a-35a) and its judgment (App., *infra,* 36a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 13a-14a) was entered on August 18, 1987. Respondents' timely petition for partial rehearing was denied on December 3, 1987 (App., *infra,* 15a). On February 24, 1988, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 6103 of the Internal Revenue Code (26 U.S.C.) is set forth in pertinent part in a statutory appendix (App., *infra,* 38a-39a).

STATEMENT

1. Respondents filed Freedom of Information Act requests with both the Internal Revenue Service (IRS) and the Bureau of Economic Analysis of the Department of Commerce (BEA) seeking certain information pertaining to the IRS's Taxpayer Compliance Measurement Program (TCMP). The TCMP is a statistical investigatory technique devised by the IRS in 1962 that is designed to measure the level of compliance with federal tax laws. It is used by the IRS to develop criteria for selecting returns for audit examination. Respondents primarily sought source documents from the TCMP investigation, including computer data tapes and related "check sheets" recording tax return and audit data in manual form. Because these source documents consisted of information relating to particular taxpayers that was taken from their tax returns or audits (see App., *infra,* 2a), the federal agencies refused to release them on the ground that disclosure of tax

"return information" is prohibited by Section 6103 of the Internal Revenue Code (26 U.S.C.).

Respondents subsequently brought two separate actions in the United States District Court for the Western District of Washington, seeking to compel the two federal agencies to disclose the documents. In the suit against the IRS, the district court originally ruled against respondents, holding that Section 6103 protected the TCMP source documents from disclosure. The court of appeals vacated and remanded. 596 F.2d 362 (1979), cert. denied, 446 U.S. 917 (1980) (*Long I*). In that decision, the court of appeals interpreted a portion of Section 6103(b) known as the "Haskell Amendment" as requiring the IRS to respond to a FOIA request by redacting identifying details from return information and then disclosing the redacted version.[1]

Respondents' suit against the BEA sought TCMP computer tapes that had been supplied by the IRS to the BEA for its use in analyzing economic statistics (see 26 U.S.C. 6103(j)(1)). While the IRS case was pending in the district court on remand, the court entered summary judgment for respondents in the BEA case on the basis of the court of appeals' decision in *Long I*. The court of appeals affirmed (646 F.2d 1310 (1981)), but this Court vacated and remanded for reconsideration in light of intervening legislation that had responded to the decision in *Long I* by amending Section 6103 to provide additional protection for TCMP data (454 U.S. 934 (1981)).[2] The court of ap-

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[1] The Haskell Amendment provides that the term "return information" "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

[2] Section 701 of the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, 95 Stat. 340, amended Section 6103 by adding to the end of the Haskell Amendment the following language: "Nothing

peals then remanded the case to the district court to consider the new statute. 671 F.2d 1229 (1982).

The district court then consolidated the two suits that were pending before it on separate remands. Following the remand in *Long I*, the government disclosed some edited computer tapes, but respondents contended that the disclosure was inadequate, both because the underlying "check sheets" were not disclosed and because the editing of the computer tapes—in particular, the deletion of ZIP Code information—was too extensive (see App., *infra*, 3a, 22a).[3] With respect to that controversy, the court, after a bench trial, ruled for the government (*id.* at 21a-37a), finding that the agencies had "fulfilled their responsibilities under the FOIA" (*id.* at 37a). Respondents noticed an appeal from that ruling (No. 84-4117 (9th Cir.)).

With respect to the remand to consider the effect of the intervening legislation, the district court found that the documents sought in that case were exempt from disclosure under the amended version of Section 6103. The court found that the requested documents fell within the purview of the amendment because they included data used for determining standards for selecting returns for audit, and it found that the Secretary had determined that

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in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws" (see App., *infra*, 39a).

[3] The check sheets at issue related to Phase II of the TCMP, which studies delinquent returns (see App., *infra*, 22a). That particular information is not used to develop audit selection criteria and thus is not covered by the ERTA amendment.

disclosure of the documents would seriously impair enforcement of the tax laws (see App., *infra,* 7a). The court of appeals reversed and remanded, holding that the district court could not rely upon the Secretary's determination that disclosure would impair enforcement, but rather was required to conduct a de novo review of the correctness of the Secretary's determination (742 F.2d 1173 (1984)). On remand, the district court reaffirmed its earlier decision that the documents were exempt from disclosure (App., *infra,* 17a-20a), finding, after an independent review, that "disclosure of the TCMP data at issue would pose a substantial risk of impairing the collection, assessment and enforcement of the tax laws, and that the commissioner's determination reaching the same conclusion was plainly correct" (*id.* at 18a). Respondents noticed an appeal from this decision (Nos. 86-3678 and 86-3679 (9th Cir.)).

2. The court of appeals consolidated the two appeals, and, on August 18, 1987, it entered its decision affirming in part and reversing in part (App., *infra,* 1a-12a). The court affirmed the district court's ruling that certain requested documents were protected by the intervening legislation because their disclosure would impair government enforcement of the tax laws (*id.* at 8a-10a), and it also affirmed the court's refusal to order disclosure of the ZIP Code identifiers (*id.* at 5a-6a). The court, however, reversed the district court's refusal to order the government to disclose the "check sheets" associated with the computer tapes of TCMP Phase II source data (*id.* at 4a-5a). The court concluded (*id.* at 5a): "The Longs are entitled under the FOIA and our decision in [*Long I*] to copies of all existing check sheets for Phase II of the TCMP. These check sheets must, of course, be edited to delete taxpayer identifying information." Accordingly, the

court of appeals remanded the case to the district court for further proceedings concerning the disclosure of the check sheets (*id.* at 11a).

3. While respondents' petition for partial rehearing in the court of appeals was pending, this Court entered its decision in *Church of Scientology* v. *Internal Revenue Service,* No. 86-472 (Nov. 10, 1987). In that case, the Court held that the Haskell Amendment did not require the government to redact and disclose "return information" that was otherwise protected from disclosure by Section 6103. After this Court's decision in *Scientology* became final, petitioners filed, on December 11, 1987, a petition for rehearing in the court of appeals, urging the court to reconsider in light of the intervening *Scientology* decision, which had rejected the legal basis for the court of appeals' decision ordering disclosure of redacted check sheets. Because more than 14 days had elapsed since the entry of the court of appeals' judgment, this petition for rehearing was accompanied by a motion for leave to file the petition out of time. On February 1, 1988, the court of appeals denied the motion to file the petition for rehearing out of time (App., *infra,* 16a).

REASONS FOR GRANTING THE PETITION

The decision below, ordering the redaction and disclosure of "check sheets" prepared by the IRS to record source data of its TCMP program, cannot be reconciled with this Court's decision in *Church of Scientology* v. *Internal Revenue Service,* No. 86-472 (Nov. 10, 1987). The check sheets at issue contain information identifying a taxpayer and other information taken from his tax return, along with corrected financial data arrived at by auditing the return. There can be no doubt that the check sheets constitute "return information" as defined in Section

6103(b). The only basis asserted by the court of appeals for ordering disclosure of such documents is its prior decision in *Long I* to the effect that the Haskell Amendment requires removal of identifying details from such documents and renders them disclosable in redacted form. But this interpretation of Section 6103 was unequivocally rejected by this Court in *Scientology*. The Court there held that, "as with a return itself, removal of identification from return information would not deprive it of protection under § 6103(b) * * * [and therefore the IRS] has no duty under the FOIA to undertake such redaction" (slip op. 8-9).[4] Thus, the court of appeals' decision ordering disclosure of the check sheets is devoid of any legal basis and is inconsistent with the dictates of Section 6103.

The court of appeals, however, declined to grant the government's motion to file a petition for rehearing out of time, and thus it has not considered the effect of this Court's *Scientology* decision upon its holding in this case. If the decision below is permitted to stand, the government will be required to disclose to respondents tax return information that indisputably is protected from disclosure under Section 6103. That result would impose a substantial administrative burden on the government.[5] More importantly, it would require public disclosure of taxpayer

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[4] Indeed, the decision in *Long I* was specifically noted by this Court in *Scientology* when it described the conflict in the circuits that impelled it to grant certiorari (see slip op. 4 n.1). There is thus no doubt that *Long I* has no continuing vitality after this Court's express rejection in *Scientology* of its holding.

[5] The IRS estimates that there are approximately 250,000 check sheets at issue in this case. If the court of appeals' decision stands, each of these check sheets would have to be redacted of identifying information manually before being reproduced and supplied to respondents.

information that Congress has determined should be kept confidential in order to protect the privacy interests of taxpayers. There is no reason why Congress's intent – and the interests of taxpayer privacy – should not be given effect here simply because this Court's *Scientology* decision was rendered more than 14 days after the entry of the court of appeals' judgment (but prior to the time permitted for petitioning for a writ of certiorari). To avoid this untoward result, we submit that this Court should vacate the decision below and remand the case to the court of appeals in order to give that court the opportunity to conform its decision to the law as recently clarified by this Court in *Scientology*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of this Court's decision in *Church of Scientology* v. *Internal Revenue Service*, No. 86-472 (Nov. 10, 1987).

Respectfully submitted.

CHARLES FRIED
Solicitor General

MARCH 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-4117, 86-3678 and 86-3679

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

BUREAU OF ECONOMIC ANALYSIS, UNITED STATES
DEPARTMENT OF COMMERCE, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON

Argued and Submitted Dec. 9, 1986
Decided Aug. 18, 1987

Before: TANG, SKOPIL AND CANBY, Circuit Judges.

PER CURIAM:

These two cases concern a Freedom of Information Act (FOIA) request for records from the Internal Revenue Service's Taxpayer Compliance Measurement Program

(TCMP). In the first case, Susan B. Long and Philip H. Long appeal a district court decision denying release of paper records and ZIP Code data related to TCMP records already released by the IRS. In the second case, the Longs appeal a district court ruling that unreleased TCMP records are exempt from disclosure under Section 6103(b)(2) of the Internal Revenue Code because disclosure would pose a substantial risk of impairing tax collection, tax assessment, and enforcement of the tax laws. The district court reached its decision in the second case after a *de novo* review of the IRS Commissioner's decision denying disclosure, as mandated by this court in *Long v. United States Internal Revenue Service,* 742 F.2d 1173, 1182 (9th Cir.1984).

The two cases were consolidated on appeal. We affirm in part, reverse in part, and remand to the district court for further proceedings.

I

The Taxpayer Compliance Measurement Program is a series of statistical studies measuring levels of compliance with the federal tax laws. TCMP source data is recorded on paper check sheets and computer data tapes. Each check sheet contains an individual taxpayer's name, address, and social security number, all financial data reported on the taxpayer's tax return, and corrected financial data arrived at by auditing the return. The computer data tapes contain the same information as the check sheets, with the exception of the taxpayer's name and address.

The first of these combined cases concerns the adequacy of TCMP records already disclosed by the IRS. In *Long v. United States Internal Revenue Service*, 596 F.2d 362, 367 (9th Cir.1979), *cert. denied*, 446 U.S. 917, 100 S.Ct. 1851,

64 L.Ed.2d 271 (1980), we held that the FOIA required the IRS to disclose edited TCMP source data unless disclosure would create "a significant risk of indirect identification" of particular taxpayers. We therefore vacated a district court order denying disclosure of TCMP records and remanded the case for further proceedings. In 1981, after the Longs had moved for partial summary judgment on remand, the IRS produced edited computer tapes containing source data for TCMP Phase II, Cycles 1-3.[1] In 1983, the IRS agreed to produce an edited tape containing data from TCMP Phase III, Cycles 1, 4, and 5.[2] The IRS has not released any of the check sheets corresponding to the computer tapes it has produced.

After a trial to the bench following the remand, the district court ruled that ZIP Code information deleted from the already-released Phase II and Phase III computer tapes was exempt from disclosure under Section (b)(3) of the FOIA, 5 U.S.C. § 552(b)(3)[3] and Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103.[4] The court also stated that "defendants have fulfilled their responsibilities under the FOIA [and] the plaintiffs' other claims are denied."

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[1] Phase II of the TCMP was a series of surveys of delinquent returns by non-farm businesses. It consisted of three surveys, or cycles, of business returns for the tax years 1963, 1966, and 1969.

[2] Phase III was a series of surveys of individual returns for the tax years 1963, 1965, 1969, 1971, and 1973.

[3] Section (b)(3) of the FOIA states that the FOIA does not apply to matters that are "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3).

[4] Section 6103(a) states in pertinent part:

> (a) General rule. – Returns and return information shall be confidential, and except as authorized by this title –

The Longs contend that the district court erred in ruling that the IRS has fulfilled its responsibilities under the FOIA. They argued that the IRS was required to release edited check sheets as well as computer tapes for Phase II of the TCMP, at least where the check sheets are needed to interpret the tapes. The Longs also contend that the court erred in ruling that partial ZIP Code information is exempt from disclosure.

A. ***Disclosure of the check sheets***

The question whether the IRS has fulfilled its responsibilities under the FOIA is a question of law subject to *de novo* review. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). In *Long v. United States Internal Revenue Service*, 596 F.2d at 367, we held that the IRS was required to disclose all TCMP source data unless disclosure would create a significant risk of identification of particular taxpayers. We specifically noted that the Longs sought disclosure of check sheets "where there is a problem with interpretation of the tapes." 596 F.2d at 366.

After our remand, it was undisputed at trial that there were problems with the interpretation of all the tapes for Phase II of the TCMP. It was also undisputed that the IRS failed to provide the Longs with three computer tapes con-

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> (1) no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

26 U.S.C. § 6103(a). Section 6103(b) states that the term "return information" "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b)(2).

taining Phase II source data. We therefore hold that the district court erred in ruling that the IRS has fulfilled its responsibilities under the FOIA, and we reverse this part of the district court's decision and remand for further proceedings. The Longs are entitled under the FOIA and our decision in *Long v. United States Internal Revenue Service* to copies of all existing check sheets for Phase II of the TCMP. These check sheets must, of course, be edited to delete taxpayer identifying information.

B. ***Disclosure of ZIP Code information***

The question whether Phase II and Phase III ZIP Code information is exempt from disclosure is a mixed question of fact and law that involves an essentially factual inquiry. We review such questions under the clearly erroneous standard. *United States v. McConney*, 728 F.2d at 1203.

Under Section (b)(3) of the FOIA, 5 U.S.C. § 552(b)(3), information need not be disclosed if it is "specifically exempted from disclosure by statute." Section 6103(a) of the Internal Revenue Code, 26 U.S.C. § 6103(a), prohibits disclosure of tax returns and tax return information except in certain specified circumstances. The statutory definition of "return information" specifically excludes "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b)(2).

In the present case, the district court found that disclosure of either full or partial ZIP Code information for Phase II returns, in combination with already released data such as type of business, number of employees, and business starting date, would create a significant risk of identification of particular taxpayers. This finding is not clearly erroneous. Even if Phase II ZIP Code data were edited to reveal only the first three digits of a taxpayer's

ZIP Code, it is reasonable to conclude that some three-digit ZIP Code areas are so small and some of the non-farm businesses surveyed so distinctive that disclosure would be likely to result in taxpayer identification. We therefore hold that the district court did not clearly err in ruling that ZIP Code data from Phase II of the TCMP are exempt from disclosure under Section (b)(3) of the FOIA and Section 6103 of the Internal Revenue Code. We accordingly affirm this part of the district court's decision.

The district court did not explicitly find that revealing ZIP Code information from Phase III individual returns would pose a significant risk of taxpayer identification. Such a finding is implicit in the district court's decision, however. We affirm the court's ruling that ZIP Code data from Phase III of the TCMP are likewise exempt from disclosure. There is evidence in the record that a person with access to ZIP Code information from TCMP records would have a greater chance of identifying all taxpayers, individuals as well as businesses. We might have arrived at a different conclusion, but we cannot say that the district court clearly erred in ruling that Phase III ZIP Code information is exempt from disclosure. We therefore affirm this part of the district court's decision as well.

II

The IRS uses data collected through TCMP surveys to create discriminant function (DIF) formulas. DIF formulas are designed to detect combinations of reported tax return line items and taxpayer reporting characteristics that are correlated with a high dollar value of total tax change after audit. A high DIF score for a particular return indicates that an audit of that return is likely to find substantial reporting errors. The IRS uses DIF formulas to select tax returns for audit.

In the second case, the Longs seek unreleased TCMP data from Phase III, Cycles 1-5 and Phase IV, Cycles 1-2.[5] The IRS has used this data to develop DIF formulas. In 1981, Congress amended the Economic Recovery Tax Act (ERTA) to provide that no federal law shall be construed to require the disclosure of data used to determine standards for selecting returns for audit "if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws." 26 U.S.C. § 6103(b)(2). The present case was remanded to the district court in light of the ERTA amendment,[6] and that court ruled that the amendment barred disclosure of TCMP records used in the development of DIF formulas. The court declined to undertake an independent examination of whether disclosure would impair assessment, collection, or enforcement of the tax laws, ruling instead that the amendment applied to the requested records and that the Commissioner of the IRS had in fact determined that disclosure would seriously impair the functioning of the tax laws.

In *Long v. United States Revenue Service,* 742 F.2d 1173 (9th Cir.1984), we reversed the district court's ruling

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[5] Phase III of the TCMP surveyed individual returns for the tax years 1963, 1965, 1969, 1971, and 1974. Phase IV surveyed corporate returns for the tax years 1969 and 1973.

The IRS has already released data from Phase II of the TCMP and from those portions of Phase III that were not used to develop DIF formulas. This already-released information is discussed in Part I of this opinion.

[6] The procedural history of this part of the case is described in detail in *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1314-17 (9th Cir.), *vacated and remanded,* 454 U.S. 934, 102 S.Ct. 468, 70 L.Ed.2d 242 (1981), and in *Long v. United States Internal Revenue Service,* 742 F.2d 1173, 1175-77 (9th Cir.1984).

that gave conclusive effect to the Commissioner's determination of harm. We held that the court had applied the wrong standard of review and that "the Commissioner's determination that disclosure of TCMP data would seriously impair the assessment, collection, or enforcement of the tax laws is subject to de novo review by the district court." 742 F.2d at 1182. We therefore remanded the case to the district court for a de novo review of the record.

After a hearing following the remand, the district court ruled again that the IRS Commissioner was correct in his determination. The court also denied the Longs' motion to appoint a panel of experts to establish an empirical test for the IRS claim of harm. Finally, the court declined to address the question whether the IRS was required to disclose Phase III, Cycle 5 panel data related to TCMP data tapes released in 1983. We affirm all three of the district court's rulings.

The question whether the TCMP records at issue in this case are exempt from FOIA disclosure involves an essentially factual inquiry into whether disclosure would impair the functioning of the tax laws. We review such questions under the clearly erroneous standard. *United States v. McConney*, 728 F.2d at 1204; *see also Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 984 (9th Cir.1985) (district court finding that document is exempt from FOIA disclosure is reviewed under clearly erroneous standard).

The Longs suggest three ways in which TCMP records could be edited so that disclosure would not pose a substantial risk of impairing the functioning of the tax system: (1) by releasing only corrected line-by-line information for each return, with no taxpayer-reported information or total tax change information; (2) by deleting both total tax change and most of the reported items on a

rotating basis for each tax return; or (3) by releasing only a small subset of the TCMP records in each cycle, so that the remaining data would be insufficient for insight into audit selection formulas. The Longs argue that some form of partial disclosure can be accomplished without substantial risk of impairing the audit selection process, and they contend that the district court clearly erred in ruling to the contrary.

We disagree. First, the district court did not clearly err in finding that partial disclosure of TCMP data "could easily allow educated insight into [DIF] formulae, sufficient to risk serious harm to the enforcement mechanisms." The Longs did present affidavits supporting their position that any one of the three plans for partial disclosure could be accomplished without substantial risk, but the court found that the Longs' materials were speculative and conclusory. The court's account of the evidence "is plausible in light of the record viewed in its entirety," and we therefore cannot say that the court's conclusion was clearly erroneous. *See Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

Second, all three of the Longs' partial disclosure plans would involve editing so extensive as to amount to the creation of new records. The law is clear that the FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136, 152, 100 S.Ct. 960, 969, 63 L.Ed.2d 267 (1980). In *Long v. United States Internal Revenue Service,* 596 F.2d at 365-66, we held that deleting names and addresses did not amount to the production of a new record because the remaining information was "reasonably segregable." *See also* 5 U.S.C. § 552(b). In the present case, partial

disclosure of TCMP data would require the IRS to do much more than simply remove taxpayer names and addresses. The Longs' first proposal would involve deletion of all reported financial data and total tax change information for each return. The second proposal would require deletion of all total tax change information and most reported information on a rotating basis for each return. The third proposal would require deletion of all but a few TCMP records in each cycle. We conclude that the editing required for partial disclosure of TCMP records is so extensive that the remaining information is not reasonably segregable, and that all three of the Longs' proposals would require the IRS to create new records. We therefore affirm the district court's ruling that the Phase III and Phase IV data at issue in this part of the case are exempt from disclosure under Section 6103(b)(2).

The Longs' other contentions are without merit. First, the district court declined to appoint a panel of experts to examine the likelihood of harm from disclosure on the grounds that "the subject matter of the dispute is [not] beyond the capacity of the District Court" and that the court "is well acquainted with even the statistical intricacies provided by the parties." The admission and exclusion of expert testimony is within the broad discretion of the district court, and we will sustain a district court's decision unless it is manifestly erroneous. *Taylor v. Burlington N.R.R.*, 787 F.2d 1309, 1315 (9th Cir.1986). We think it is clear that the there was no manifest error in the court's refusal to appoint an expert panel in the present case. Second, the question whether the IRS was required to release sample codes and weights for Phase III, Cycle 5 panel data was simply beyond our mandate to the district court in *Long v. United States Internal Revenue Service*, 742 F.2d 1173 (9th Cir.1984). We therefore affirm this part of the district court's ruling as well.

CONCLUSION:

In No. 84-4117, we affirm the district court's ruling that ZIP Code information from Phase II and Phase III of the TCMP is exempt from disclosure. We reverse the district court's ruling that the IRS has fulfilled its responsibilities under the FOIA, and we remand the case to the district court for further proceedings limited to the question of disclosure of existing check sheets for Phase II of the TCMP. In Nos. 86-3678 and 86-3679, we affirm the district court's determination that the unreleased Phase III and Phase IV TCMP data sought by the Longs are exempt from disclosure under Section 6103(b)(2). We also affirm the court's denial of the Longs' motion to appoint an expert panel and the court's refusal to address the question whether the IRS was required to disclose Phase III, Cycle 5 panel data related to TCMP data tapes released in 1983. Each party will bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CANBY, Circuit Judge, concurring in part and dissenting in part:

I agree with the court's opinion in all but two respects. With regard to appeal No. 84-4117, I would require the IRS to release three-digit ZIP Code data relating to individual taxpayer returns. The testimony is undisputed that three-digit Zip Code areas include approximately 250,000 persons. In the face of this fact and other undisputed evidence in the record, there is nothing to support a finding that there would be a serious risk of taxpayer identification if the partial Codes were released.

In appeals No. 86-3678 and 86-3679, I would order the IRS to supply the line-by-line corrected information for each return in the sample. The evidence is conclusive that

the release of such information, unaccompanied by taxpayer-reported line-by-line information or by any tax change information, could not possibly lead to the construction or approximation of DIF formulae. With respect to the other requested information, however, I cannot say that the district court clearly erred in finding that disclosure would seriously impair enforcement.

The court's opinion holds that modifying the tapes to reflect only the corrected information would amount to the creation of a new record. I disagree. The corrected line-by-line information is part of existing records of the TCMP. To remove the taxpayer-reported information and tax change information that is recorded with the corrected information would simply amount to redaction or deletion. It can be accomplished by a computer program. We ordered deletions of greater magnitude in *Long v. Internal Revenue Service*, 596 F.2d 362, 365-67 (9th Cir.1979). I would order them here.

With these two exceptions, I join the court's opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-4117

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

DC No. Cv75-228
Cv 78-176

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

BUREAU OF ECONOMIC ANALYSIS AND UNITED STATES
DEPARTMENT OF COMMERCE, DEFENDANTS-APPELLEES

CA No. 86-3678
DC No. Cv75-228
Cv78-176

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

CA No. 86-3679
DC No. Cv78-176
Cv75-228

SUSAN B. LONG AND PHILIP B. LONG,
PLAINTIFFS-APPELLANTS

v.

BUREAU OF ECONOMIC ANALYSIS AND UNITED STATES DEPARTMENT OF COMMERCE, DEFENDANTS-APPELLEES

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each will bear its own costs.

Filed and Entered August 18, 1987

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-4117
DC No. 75-228C/78-176C

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

CA Nos. 86-3678/3679

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

BUREAU OF ECONOMIC ANALYSIS, UNITED STATES
DEPARTMENT OF COMMERCE, DEFENDANT-APPELLEE

[Filed December 3, 1987]

ORDER

Before: TANG, SKOPIL AND CANBY, Circuit Judges.

The petition for partial rehearing is denied.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-4117
86-3678/3679

SUSAN B. LONG AND PHILIP H. LONG,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES INTERNAL REVENUE SERVICE,
DEFENDANT-APPELLEE

[Filed February 1, 1988]

ORDER

Before: TANG, SKOPIL AND CANBY, Circuit Judges.

The motion of the Internal Revenue Service for leave to file a petition for hearing out of time is DENIED. The motion to recall or stay the mandate is also DENIED.

In light of the representation of the Internal Revenue Service that it intends to pursue its contentions based on *Church of Scientology v. Internal Revenue Service,* 56 U.S.L.W. 4003 (U.S. Nov. 10, 1987), in district court, the request of appellants for attorneys' fees on appeal is DENIED, without prejudice to its renewal in district court.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Cause No. C75-228C

SUSAN LONG AND PHILIP LONG, PLAINTIFFS

v.

UNITED STATES INTERNAL REVENUE SERVICE, DEFENDANT

[ORAL RULING Filed 3/14/86]

THE COURT: This matter is before the Court following reversal and remand from the decision of the Ninth Circuit Court of Appeals cited at 742 F2d 1173, (9th Cir. 1984).

Pursuant to that order, this Court is directed to perform a de novo review of the Commissioner of Internal Revenue's determination that disclosure of the data remaining at issue would seriously impair assessment, collection or enforcement under the Internal Revenue laws, Id. at 1184.

Procedurally, the Ninth Circuit noted, quote, "We do not mean to imply that the Longs are entitled to an adversarial proceeding in the nature of a trial. In proceeding de novo, the District Court should first attempt to resolve the issue by means of detailed affidavits or oral testimony." Id. at 1182.

These oral findings and conclusions will be in lieu of written findings and conclusions.

The Court has now received extensive affidavits and deposition transcripts from both parties concerning this

issue, has reviewed that material, and has entertained oral argument from the parties. Having done so, the Court finds that the commissioner has borne his burden of proving that his determination of impairment was correct.

This conclusion is logical as a matter of common sense. Disclosure of the information sought by plaintiffs would place at risk the fundamental ability of the Internal Revenue Service to accomplish its mandated purpose of enforcing this nation's tax laws.

As the Ninth Circuit's order noted, quote, "Deference is especially appropriate where, as here, the commissioner is likely to have unique insights into the problems that release of TCMP data may pose," end of quote, Id. at 1182.

More importantly, the Court's conclusion is made inescapable by the detailed, comprehensive and nonconclusory affidavits filed by the commissioner, which have not been refuted by the speculative and conclusory materials submitted by the plaintiffs.

The commissioner has shown to the satisfaction of the Court that the data at issue here have been used by the Internal Revenue Service to develop formulae for the selection of tax returns for audit, and that disclosure of that data could permit knowledgeable taxpayers to manipulate their tax returns to avoid selection for audit, whether they were fully cognizant of the formulae, or whether they were simply aware of the variables used and not used in those formulae.

Accordingly, the Court finds and concludes that disclosure of the TCMP data at issue would pose a substantial risk of impairing the collection, assessment and enforcement of the tax laws, and that the commissioner's determination reaching the same conclusion was plainly correct.

For clarity of the record, the Court will address certain ancillary arguments raised by plaintiffs in their brief for this hearing.

First, plaintiffs' contentions that disclosures already made have rendered the commissioner's conclusion moot, or that unused portions of the TCMP data base could be revealed without creating any risk, are both plainly without merit. The numerous disclosures which have been made to date to the plaintiffs and the information in the public domain have never opened to public review information which would allow anything but mere conjecture as to the variables in the DIF formulae.

In contrast, the record before the Court is clear that disclosure of the data now sought, in whole or in part, could easily allow educated insight into those formulae, sufficient to risk serious harm to the enforcement mechanisms.

Secondly, plaintiffs' suggestion of the appointment of an expert panel is rejected. These cases have been pending since 1975 and 1978, respectively. In simple English, it is time to have them finally decided. Additionally, the Court, which has been involved in this case since 1981 and which has already read innumerable submissions and heard extensive argument and six days of trial, is well acquainted with even the statistical intricacies provided by the parties. This is not a case in which the subject matter of the dispute is beyond the capacity of the District Court to determine, as was observed by the Ninth Circuit.

Accordingly, the Court declines plaintiffs' invitation to add greater and unnecessary delay and expense to this matter by appointing an expert panel.

Therefore, the Court finds and concludes that the commissioner's determination that the data sought by plaintiffs has been used for the determination of standards for

the selection of returns for audit, and that disclosure of the data sought by the plaintiffs would seriously impair assessment, collection or enforcement of the tax laws, has been established as correct by a preponderance of the evidence and based upon a de novo review of the evidence submitted by both parties in this case. Thus, the information sought by plaintiffs is exempt from FOIA disclosure.

Lastly, plaintiffs' briefs submitted for this hearing purport to inject another issue at this late stage of the proceedings, seeking production of further data from tapes produced by the IRS in 1983. The only issues remaining in these cases, after remand from the Ninth Circuit, were the de novo review of the commissioner's determination and the attorneys fee question. It is not now timely to attempt to relitigate a 1983 production of documents. Moreover, the Court is satisfied that the defendant has produced that portion of this request that should have been produced.

These cause numbers, which date back to 1975 and 1978, should not be permitted to become a perpetual repository for plaintiffs' pursuit of information. Final judgment is to be entered for defendants on all remaining issues, in both cases, and if plaintiffs have further document requests they can file new lawsuits.

With regard to the attorneys fees question, I'll ask plaintiffs to submit any requests they might have within one week from today, the defendants to respond within one week after that.

If the Court needs a hearing, I'll call for it, otherwise I'll issue a further order.

* * * * *

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C75-228C

SUSAN B. LONG AND PHILIP H. LONG, PLAINTIFFS

v.

UNITED STATES INTERNAL REVENUE SERVICE, DEFENDANT

No. C78-176C

SUSAN B. LONG AND PHILIP H. LONG, PLAINTIFFS

v.

BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE, DEFENDANT

[Filed June 30, 1983]
[Amended August 25, 1983]

MEMORANDUM OPINION

In 1975 plaintiffs filed Civil Action No. C75-228C against the United States Internal Revenue Service ("IRS") and, in 1978, filed Civil Action No. C78-176C against the Bureau of Economic Analysis ("BEA"). The two actions were later consolidated. What appeared to be routine Freedom of Information Act ("FOIA") cases thereafter followed a torturous trail of voluminous pleadings (sixteen volumes), motions, hearings, appeals, remands and, finally, trial on June 14 to 22, 1983.

Plaintiffs, Philip H. and Susan B. Long, have had a history of over a decade of FOIA ligitation with the

Internal Revenue Service. During this period plaintiff Susan B. Long estimates she has filed 216 FOIA requests with the IRS and thirteen FOIA lawsuits against the IRS and BEA. On one day in May, 1979, plaintiffs filed thirty-three FOIA requests with the IRS. Plaintiffs' FOIA requests and lawsuits are the result of an intense interest in IRS documents which apparently developed after plaintiffs were the subject of an IRS audit.

In *Long v. IRS*, plaintiffs sought (a) reports and analyses; (b) statistical tabulations; (c) statistical design records; and (d) "microdata" from the Individual Returns Filed Phase (Phase III), Corporate Returns Filed Phase (Phase IV), and Delinquent Returns Phase (Phase II) of the Taxpayer Compliance Measurement Program ("TCMP"). In *Long v. BEA* plaintiffs sought computer tapes containing microdata from TCMP Phase III, Cycles 1-5, from which taxpayer identifications has been deleted.

The IRS has voluntarily produced the documents described in paragraphs (a)-(c) above. Many of the disputes regarding paragraph (d) and the documents sought in *Long v. BEA* have been resolved upon summary judgment or by voluntary agreement of the IRS. The issues which remain for determination are:

1. Whether the Court should enter a permanent injunction requiring, among other things, that the IRS produce "similar" documents in the future.

2. Whether the Court should make a finding that IRS employees have acted in an arbitrary and capricious manner.

3. Sufficiency of IRS production, including adequacy of the IRS search for responsive materials; ZIP Code deletion; and problems with computer tapes and documentation.

4. Whether the IRS should waive fees for copying of certain documents and tapes (this issue now involves approximately $1,000).

5. Attorneys' fees.

SHOULD AN INJUNCTION ISSUE?

Plaintiffs contend that the IRS should be permanently ordered to permit inspection and copying by plaintiffs of the statistical tabulations made available in this case and that the IRS should be permanently enjoined from withholding reports and analyses, statistical tabulations and statistical design records from future cycles of TCMP Phases III and IV.

Plaintiffs contend that at an earlier hearing in this case defendants stipulated to the entry of a permanent injunction. Defendant disputes this contention. The Court has carefully reviewed the transcript of those proceedings (Plaintiffs' Exhibit 21), and has considered the testimony regarding the alleged stipulation and cannot conclude that defendant stipulated to entry of a permanent injunction. Rather, the transcript merely contains statements by an employee of defendant that the IRS will cooperate with plaintiffs regarding further production of documents, and that some vaguely referenced agreement had been entered into. There was no showing of what that agreement was.

It is necessary, therefore, for the Court to determine whether plaintiffs' request for injunctive relief should be granted. A similar issue arose in *Long v. IRS*, 693 F.2d 907 (9th Cir. 1982), a case which also involved TCMP data. The trial court had declined to enter an injunction because "(1) an injunction against withholding similar documents in the future would be too vague, and would create more conflict than it would resolve; (2) a prospective order would improperly circumvent the agency and

bypass the agency's right to claim exemptions as applicable to specific documents; and (3) the Economic Recovery Act of 1981 (ERTA) affected the duty of the IRS to disclose this type of information." 693 F.2d at 907.

On appeal, the Ninth Circuit held the district court had failed to consider the standards set forth in *GSA v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969), and *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953). The circuit reversed and remanded to the district court "to weigh all the relevant factors and require compliance within a reasonable time. . . ."

It is, therefore, incumbent upon the Court to apply the standards of *Benson* and *Grant* to the facts of this case. Those standards were described by the Supreme Court as follows:

> "[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." 345 U.S. at 633.

The Court has carefully considered these standards as they apply to the facts of this case. Plaintiffs contend that defendant has displayed a pattern of repeated refusal to disclose non-exempt documents and a likelihood of continuing in this conduct. The Court disagrees. In fact, defendant has repeatedly disclosed non-exempt documents to plaintiffs voluntarily, and has refused disclosure in certain instances where a bona fide controversy existed re-

garding the exempt status of the documents. In many respects defendants' position on exempt status has been upheld by the Court. In those instances where disclosure was ordered, there is no reason to believe defendant would refuse to comply with the law in the future. The Court was persuaded by the testimony of defendant's witnesses that their expressed intent to comply with FOIA is bona fide and made in good faith. They testified that they will produce the same type of records in the future that they have been voluntarily produced in this case or that have been ordered to be produced. Regarding the "character of past violations," it must be noted that many of the documents involved in this case are highly sensitive. Some contain data from individual taxpayers' returns. Most were used in an effort to determine how best to achieve taxpayer compliance with the Internal Revenue laws. Still others were used to create formulas for the selection of taxpayer returns for audit. That the IRS might have concerns regarding the public disclosure of these documents is understandable. Moreoever, those concerns have, in several instances, been found to be valid.

Considering "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and . . . the character of the past violations," an injunction is not warranted in this case.

Lastly, considering the magnitude of the ongoing TCMP program (over 1,300,000 pages of statistical tabulations were produced to plaintiffs), and the diversity and uncertainty of the types of documents to be generated in the future, any injunction would lack the specificity required under Fed. R. Civ. P. 65(d).

ARBITRARY AND CAPRICIOUS CONDUCT

Plaintiffs urge the Court to make a finding pursuant to 5 U.S.C. § 552(a)(4)(F) that employees of defendants

acted in an arbitrary and capricious manner. Such a finding would trigger an investigation to determine whether disciplinary action is warranted against the individual employees. Plaintiffs contend that IRS employees have submitted false or misleading statements to the Court regarding the existence of exempt information, have little more than suspicions and unsubstantiated charges of false testimony. Certainly, the evidence introduced by plaintiffs did not establish that the testimony and representations of the IRS representatives was untrue.

Plaintiffs seek disclosure of the first three digits of the five-digit ZIP Codes contained in certain of the TCMP data. TCMP computer tapes, in their original form, contained taxpayers' Social Security numbers, employer identification numbers, addresses, ZIP Codes and other information contained in tax returns. In the case of a business return, the type of business, date when the business commenced operations, number of employees, types of excise taxes paid, indicators of the size of the business, etc., were contained on the computer tapes.

Pursuant to 26 U.S.C. § 6103 (which precludes disclosure of tax return information in a form which could be associated with a particular taxpayer), the Court ordered that taxpayer identification data be deleted from the tapes. In accordance with this order, defendant removed from computer tapes the taxpayer's Social Security number, employer identification number, and address, including the ZIP Code.

Plaintiffs contend that disclosure of the first three digits of the ZIP Code would not create a significant risk that a particular taxpayer's identity could be discerned from data on the tapes. There are approximately 37,000 five-digit ZIP districts in the United States, and about 875 three-digit ZIP districts. A three-digit ZIP district has a population of approximately 250,000 people. Testimony at trial

established that disclosure of the first three digits of a taxpayer's ZIP Code, when coupled with other specific information on the taxpayer's return, could easily result in disclosure of sufficient material to identify the individual taxpayer whose tax return data was contained on the computer tapes. For example, disclosure of three digits of the ZIP Code for the Boeing Company, when coupled with other data contained on the computer tapes such as business start date, number of employees, indicators of the size of the business, etc., could readily result in the release of Boeing's tax return data in direct violation of § 6103. The same would likely be true of other taxpayers. Accordingly, the Court finds that it would be inappropriate to compel disclosure of the ZIP Code information sought by plaintiffs.

Plaintiffs claim that the computer tapes and documentation were inadequate and incomplete. The evidence at trial established to the Court's satisfaction that these problems were caused by the age of the tapes and documentation, the departure of personnel who might have been able to assist in their interpretation, and changes in computer technology in the intervening period of time. Defendants produced what they had, and were not obliged to recreate data to plaintiffs' satisfaction. Plaintiffs' evidence did not establish that additional tapes or documentation existed, or that defendants failed to fulfill their responsibilities under FOIA.

FEE WAIVER

In releasing documents at issue in this case, the IRS denied plaintiffs' request for waiver of copying fees. In doing so, the IRS stated: "It is our belief that the release of the information does not benefit the general public. Therefore, we are denying your request for a waiver of fees."

When this denial was made the copying fees being charged were substantial. Subsequently, defendants voluntarily reduced the copying charges to approximately $1,000. Additionally, plaintiffs wish to copy some of the approximately 1,300,000 pages of statistical tabulations previously produced for their inspection and will presumably seek a fee waiver for those copies.

5 U.S.C. § 552(a)(4)(A) provides:

> "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the public."

5 U.S.C. § 552(a)(4)(B) provides for a *de novo* review by the district court of agency decisions under FOIA. In *Rizzo v. Tyler*, 438 F. Supp. 895 (S.D.N.Y. 1977), the court held that these *de novo* review provisions of § 552 applied to agency decisions with respect to waiver of copying costs.

Having considered the testimony of plaintiff Susan Long and others about her research and future plans, the Court is satisfied that there is sufficient public benefit from her efforts to justify waiving the relatively insignificant copying costs at issue in this case. Accordingly, plaintiffs' fee waiver request for the Panel Data and Phase III, Cycle 1 data is granted.

In addition, defendants have agreed to again make available to plaintiffs the 1,300,000 pages of statistical tabulations. Although there is presently no issue before the Court regarding fee waiver for copying of that data, the Court would suggest, for the guidance of the parties, that a fee waiver for copies of a reasonable number of those documents would be appropriate. On the other hand, the public benefit to be derived from an analysis of

that data would certainly not justify a fee waiver for copying of the entire set of 1,300,000 documents.

ATTORNEYS' FEES

Under the terms of the Pretrial Order entered in this case, the parties are to make post-trial submittals on the issue of attorneys' fees. Those submittals will be made within thirty (30) days the date of this Memorandum Opinion.

Considering the documents which were voluntarily produced after commencement of the litigation, and ordered produced, plaintiffs have prevailed on sufficient issues to justify an award of attorneys' fees.

The parties' submittals should be organized in a manner which will facilitate the type of analysis described in *Hensley v. Eckerhart,* 103 U.S. [*sic*] 1933 (1983). For example, plaintiffs' time records should permit segregation of fees into discrete time periods such as those before and after voluntary and court-ordered production of documents by defendants. In addition, to the extent possible, plaintiffs should segregate hours devoted to discovery related solely to the issue of defendants' proposed copying costs.

After these submissions, the Court will determine the appropriate award of attorneys' fees.

The Clerk of this Court is instructed to send uncertified copies of this Memorandum Opinion to all counsel of record.

DATED this 30th day of June, 1983.

/s/ JOHN C. COUGHENOUR
John C. Coughenour
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C75-228C

SUSAN B. LONG AND PHILIP H. LONG, PLAINTIFFS

vs.

UNITED STATES INTERNAL REVENUE SERVICE, DEFENDANT

No. C78-176C

SUSAN B. LONG AND PHILIP H. LONG, PLAINTIFFS

vs.

BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, DEFENDANT

[Filed June 30, 1983]

FINDINGS OF FACT

1. On April 7, 1975, plaintiffs filed Civil Action No. C75-228C against the Internal Revenue Service ("IRS") seeking the following data relating to certain specified phases and cycles of the Taxpayer Compliance Measurement Program ("TCMP"):

a. Reports and analyses;
b. Statistical compilations;
c. Records outlining the statistical design (both planned and achieved); and
d. Source documents, including forms, cards, tape, and other storage media.

2. The IRS agreed to and did provide plaintiffs records covered by subparagraphs a, b and c above.

3. On March 22, 1978, plaintiffs filed a Freedom of Information Act ("FOIA") lawsuit against BEA seeking copies of certain computer tapes containing TCMP data for Phase III, Cycles 1-5.

4. On July 12, 1982, this Court granted summary judgment for the IRS, ruling that since data on the computer tapes and checksheets relating to TCMP Phase III, Cycles 1-5 and Phase IV, Cycles 1 and 2, had been used in the development of standards for the selection of tax returns for audit, such data is exempt from disclosure under 26 U.S.C. § 6103(b)(2), as amended by Congress on August 13, 1981.

5. On April 12, 1983, the Court granted the BEA's motion for summary judgment, and held that the computer tapes from Phase III, Cycles 1-5, were protected from disclosure under 26 U.S.C. § 6103(b)(2), as amended.

6. The earlier District Court rulings of June 1, 1976 (reaffirmed on August 16, 1976) and September 13, 1976, in *Long v. IRS,* disposed of issues relating to disclosure of certain documents which were covered by paragraphs 4(a) and (c) of the Complaint. Further, since this suit was filed, plaintiffs have had access to and obtained copies of an extensive number of TCMP reports, analyses, statistical design records, and statistical output tables.

7. On July 15, 1981, twenty-three (23) reels of computer tapes containing the source data pertaining to TCMP Phase II, Cycles 1-3 were produced to plaintiffs with all available supporting documents, including tape record layouts and item descriptions. Subsequently, defendant waived all copying costs for these data tapes.

8. Phase II was a survey of delinquent returns of nonfarm businesses, and consisted of three cycles conducted

in 1963, 1966, and 1969. There were no subsequent Phase II surveys or cycles conducted after 1969.

9. After an extensive search, IRS has provided plaintiffs with all available documentation, including tape record layouts and item descriptions, relating to the computer tapes for Phase II, Cycles 1, 2 and 3.

10. The Phase II computer tapes relating to Files 7 and 8 lack sufficient documentation to enable the IRS to locate and/or interpret the data so as to delete portions of the tape containing taxpayer identifying information. Without this documentation the tapes are of no value for scholarly research. Disclosure of these tapes would involve a significant risk of taxpayer identification.

11. Certain data from Files 5, 7 and 8 of the Phase II computer tapes cannot be recreated from the original checksheets because many of the checksheets have been destroyed and, even if available, the age of the checksheets and the coding and interpretation problems make it virtually impossible to use the information thereon.

12. By letter dated June 3, 1983, the IRS represented that it would make available an edited copy of the Panel Study data from TCMP Phase III, Cycles 4 and 5, upon plaintiffs' agreement to pay nominal costs of copying in the amount of $118.18.

13. By letter dated June 10, 1983, the Internal Revenue Service further represented that it would make available edited copies of the perfected TCMP computer tapes containing approximately 18,000 business returns in the Phase III, Cycle 1, survey and, in addition, the partnership return information gathered in conjunction with Phase III, Cycles 4 and 5, upon plaintiffs' agreement to pay reasonable costs for search and duplication of the data. The IRS quoted a cost estimate of $901.00 from the IRS Detroit Data Center, and stated that further cost

estimates were being solicited from the National Computer Center.

14. Plaintiffs have submitted to the IRS over the years numerous FOIA requests, appeals, and associated pieces of correspondence seeking access to IRS documents, including those pertaining to the TCMP program and IRS audit selection procedures and techniques. In addition, plaintiffs have filed in this District Court several FOIA lawsuits against the IRS and have pursued discovery of IRS documents within those lawsuits.

15. In its orders dated May 4, 1981 and May 12, 1981, the Ninth Circuit awarded plaintiffs reasonable attorneys' fees and costs through May 4, 1981, in the BEA case.

16. Plaintiffs ultimately did not prevail on their claims in the BEA case.

17. The only documents that plaintiffs have received in the IRS case over IRS's initial claim of exemption have been the Phase II data tapes produced on July 15, 1981. The other documents that are being released, as well as the Phase II data, were reasonably withheld originally under an exemption based upon Internal Revenue Code Section 6103 by virtue of 5 U.S.C. § 552(b)(3). When the Ninth Circuit ruled that Section 6103 did not apply and when it was determined that the Phase II data was not used or to be used in the development of standards used in the audit selection process, IRS voluntarily agreed to disclose that data.

18. The items deleted from the TCMP Phase II, Cycles 1-3, final perfected master file computer data tapes consist of the taxpayer's name, Social Security number or Employer Identification Number, and address, including five-digit ZIP Code. Knowledge of a taxpayer's five-digit ZIP Code or three-digit ZIP Code, in combination with one or more of several data items gathered in TCMP

Phase II, *e.g.*, type of business, number of employees, business starting date, would involve a significant risk of identification of particular taxpayers.

19. There is sufficient public benefit from the disclosure of documents to plaintiffs to require waiver of those copying costs presently sought by defendants.

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court by virtue of the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

2. Injunctive relief mandating continual production of the TCMP records sought in this lawsuit is not in the public interest. The IRS has produced large numbers of TCMP reports and analyses, records outlining the statistical design and statistical tabulations or output tables requested in this litigation, and in response to specific requests that reasonably describe such records the agency has indicated it will produce those same records in the future. The expressed intent by the agency to comply with the FOIA as to the records already produced appears to have been made in good faith, and there does not appear to be a need for an injunction to cause the discontinuance of past violations of the disclosure provisions of the FOIA with respect to the TCMP documents involved in this case.

3. It is further held that, in view of the magnitude of the TCMP program, the volume of documents generated and the diversity and uncertainty of the types of documents to be generated in the future, a permanent injunction should not be entered requiring the release of records "similar" to those TCMP records sought in this lawsuit. Any such injunction would lack the specificity as to subject matter required under Fed. R. Civ. P. 65(d).

4. The items deleted from the TCMP Phase II, Cycles 1-3 computer data tapes, including ZIP Codes, constitute

taxpayer identifying information as described in I.R.C. Section 6103, and are, therefore, exempt from disclosure pursuant to Section (b)(3) of the FOIA in conjunction with I.R.C. Section 6103(a).

5. The circumstances surrounding the withholding of the computer data tapes pertaining to Phase III, Cycles 1-5, and Phase IV, Cycles 1 and 2, do not raise questions of arbitrary and capricious conduct by personnel from the IRS or the BEA.

6. The FOIA does not require IRS to recreate, recopy, or change the coding scheme of the Phase II tapes.

7. Pursuant to 5 U.S.C. § 552(a)(4)(A), a waiver of fees is warranted to the extent of the charges presently being sought by defendants.

8. An award of attorney's fees will be made after the parties' submittals on this issue.

The Clerk of this Court is instructed to send uncertified copies of these Findings of Fact and Conclusions of Law to all counsel of record.

DATED this 30th day of June, 1983.

/s/ JOHN C. COUGHENOUR
John C. Coughenour
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C75-228C

SUSAN B. LONG AND PHILIP H. LONG, PLAINTIFFS

vs.

UNITED STATES INTERNAL REVENUE SERVICE, DEFENDANT

No. C78-176C

SUSAN B. LONG AND PHILIP H. LONG, PLAINTIFFS

vs.

BUREAU OF ECONOMIC ANALYSIS, U.S. DEPARTMENT OF COMMERCE, DEFENDANT

[Filed July 11, 1984]

JUDGMENT ON DECISION BY THE COURT

1. This action came before the Court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs' request for injunctive relief is DENIED; that the problems and delays in the production of information by the defendants has not been the result of "arbitrary and capricious" conduct on the part of defendants' employees; therefore, plaintiffs' request for a finding pursuant to

5 U.S.C. § 552(a)(4)(F) that employees of defendants may have acted in an arbitrary and capricious manner is DENIED; that plaintiffs' request for the first three digits of the ZIP Code contained in certain of the TCMP data is DENIED; that plaintiffs' request for a waiver of copying fees for the Panel Data and Phase III, Cycle I data is GRANTED; that the computer tapes and documentation provided by defendants were adequate and complete; that defendants produced what they had and are not obliged to recreate data to plaintiffs' satisfaction; therefore, defendants have fulfilled their responsibilities under the FOIA; the plaintiffs' other claims are DENIED.

The Court entered a separate Judgment for attorney's fees on January 27, 1984.

DATED this 11th day of July, 1984.

/s/ CHARLES R. BUCHANAN
Charles R. Buchanan
Deputy Clerk of Court

APPENDIX I

Section 6103 of the Internal Revenue Code (26 U.S.C.) provides in pertinent part:

> Confidentiality and disclosure of returns and return information
>
> **(a) General Rule.** – Returns and return information shall be confidential, and except as authorized by this title –
>
> (1) no officer or employee of the United States
>
> * * * * *
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.
>
> **(b) Definitions.** – For purposes of this section –
>
> * * * * *
>
> (2) **Return information.** – The term "return information" means –
>
> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or

the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense
* * *

* * * * *

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60357

Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1621

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES INTERNAL REVENUE SERVICE and BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE,

Petitioners,

v.

SUSAN B. LONG and PHILIP H. LONG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Should the petition be denied because the IRS expressly and voluntarily agreed to release the information it now seeks to withhold?

2. Was the petition timely, where the IRS waited until more than 90 days after judgment and the finality of that judgment was not suspended by Respondents' petition for partial rehearing in a separate appeal?

3. Does the Court's recent decision in *Church of Scientology v. IRS*, involving a request for records in files on identified specific taxpayers, prevent disclosure of records from an IRS statistical sample?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the petition for writ of certiorari and the summary action requested by IRS. Certiorari should be denied because (a) the IRS expressly and voluntarily agreed to the disclosure it now seeks to avoid, (b) the IRS petition is not timely, and (c) the Court's recent *Church of Scientology* decision does not bar release of the records at issue here.

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STATEMENT OF FACTS

Respondent Susan Long is a professor at Syracuse University and an expert on tax policy and tax research. RT 128-34, P.Ex. 132(a)—(k).[1] She has many publications based on her tax research. See, *e.g., The Internal Revenue Service: Measuring Tax Offenses and Enforcement Response,* a book published in 1980 by the National Institute of Justice of the U.S. Department of Justice, P.Ex. 132(e). Dr. Long and her husband brought suit under the Freedom of Information Act in 1975 to obtain statistical data compiled in an IRS research program known as the Taxpayer Compliance Measurement Program (TCMP).

The TCMP is a series of scientific surveys which compile statistical data in an effort to answer fundamental tax policy questions concerning matters such as long range goals, appropriation requests and proposals for changes in the tax laws. The program was established in 1962 "as

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[1] "RT" refers to the Reporter's Transcript. "P.Ex." refers to plaintiff's trial exhibits.

a scientific research system" to provide a data base for long range planning of tax administration and policy. IRM Supp. July 2, 1962, P. Ex. 157. The purposes of the TCMP were summarized by IRS as follows (IRM § 125(18).1, P.Ex. 157):

> (1) The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of limited resources can be evaluated.
>
> (2) In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to improve the efficiency and effectiveness of existing operations in terms of such matters as allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, budget requests, and general tax administration policy and systems.

The TCMP includes various types of surveys covering different types of taxpayers (individual, small corporation, exempt organizations, etc.) Each type of survey is known as a "phase". Dr. Long sought survey records from Phase II (non-farm businesses that failed to file returns), Phase III (individual returns), and Phase IV (small corporation returns). CR 412 at 3-4.[2] For each survey the IRS selected a random sample of returns for intensive audits to determine each return's accuracy or, in the case of Phase II (delinquent business nonfilers), an audit to determine whether a business should have filed a tax return. The TCMP survey information is entered on forms known as "check sheets" which contain information about the re-

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[2] "CR" refers to the Clerk's Record.

ported tax (if any), summaries of income and deductions, the schedules and forms that should have been filed, and the corrected actual tax due. The survey data are then developed into statistically accurate models and placed on computer tapes which can be used by statisticians to represent the total population. These TCMP statistical models are excellent research tools and are thus "extremely useful in formulating tax policy and evaluating current practices.' *Long v. IRS*, 596 F.2d 362, 364, 369 (9th Cir. 1979); *Long v. BEA*, 646 F.2d 1310, 1314 n. 1 (9th Cir. 1981).

The TCMP statistical compilations at issue here are from Phase II, a survey conducted in 1963, 1966 and 1969. CR 412 at 3-4. The purpose of these business nonfiler surveys was to determine the overall tax significance of the non-farm businesses' failure to file tax returns and identify the characteristics of business nonfilers. P.Ex. 133(b) and (s); P.Ex. 157, § 2.05 (IRM Supp.) Each survey took about three years to complete. P.Ex. 133(a), (b) and (c).

Susan Long began seeking access in 1972 to TCMP statistical compilations, including the Phase II surveys. After unsuccessfully pursuing administrative remedies, she filed this case in 1975. The district court ruled in 1976 that Susan Long could have access to statistical tables from TCMP, but she could not receive the compilations of data from which the tables were prepared. The court of appeals reversed, holding that TCMP data compilations were disclosable in either computer tape or check sheet form, without taxpayer identifying information. 596 F.2d 362 (9th Cir. 1979). The Court noted that the computer tapes were primarily sought, but check sheets might be necessary to interpret the tapes. 596 F.2d at 364, 366.

The IRS petitioned for certiorari, raising a new issue concerning harm to audit selection procedures if some TCMP data were disclosed. The IRS made no argument relating to the Phase II business nonfiler data compilations at issue here, since these surveys were not used in development of audit selection formulas. The Court denied certiorari. 446 U.S. 917 (1980).

On remand the IRS specifically agreed to release the Phase II TCMP statistical data. Pretrial Order, CR 412 at 6. In July, 1981, the IRS provided 23 computer tapes containing Phase II data to Dr. Long. *Id.*

After working with the 23 tapes, Dr. Long found they were not usable because of inadequate documentation to explain how the statistical data are arranged on the tapes. RT 495. At trial in 1983 the IRS agreed that some Phase II files were not provided on tapes and, moreover, there were problems with interpreting all the Phase II computer tapes. Petition App., p. 4a; 825 F.2d at 227-28. Dr. Long therefore sought copies of check sheets in order to interpret the computer tapes she had received, and the district court found the "IRS voluntarily agreed to disclose that [Phase II] data." Finding No. 17, Petition App., p. 33a. The district court dismissed the case, although the IRS had not yet provided the check sheets.

Susan Long appealed, stating the IRS was still not releasing the Phase II check sheets, despite its agreement to disclose Phase II survey data, and she sought another order requiring the IRS to make them available. Petition App., p. 3a; 825 F.2d at 227. The IRS responded by stating that the trial court's action "did not constitute a denial of access to the check sheets." IRS Br., No. 84-4117, p. 31.

IRS stated only that Dr. Long had a responsibility to pay copying charges, *id.* at 30 n.14. The court of appeals therefore ordered the IRS to comply with its agreement to release the check sheets. Petition App., p. 5a; 825 F.2d at 228.

In its petition for certiorari, the IRS seeks a remand for reconsideration of the order requiring IRS to comply with its voluntary agreement to release the Phase II check sheets to assist Dr. Long interpreting the computer tapes IRS already released.

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ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE INTERNAL REVENUE SERVICE SPECIFICALLY AGREED TO RELEASE THE INFORMATION IT NOW SEEKS TO WITHHOLD.

The IRS is asking this Court to summarily vacate and remand the decision of the court of appeals requiring release of Phase II check sheets. The IRS seeks this relief even though it expressly agreed to release of this information in the pretrial order. Because of the IRS's voluntary agreement to release the data, certiorari should be denied.

A pretrial order, when agreed to by the parties and entered by the district court, "shall control the subsequent course of the action." Rule 16(e). The parties are bound by their admissions and stipulations included in the pretrial order, and may not contradict its terms. 3 *Moore's Federal Practice*, p. 16-63 (1987). The order may be "modified only to prevent manifest injustice." Rule 16(e).

In this case an agreed order was entered in June, 1983. The pretrial order stated, in the section containing "Admitted Facts", that IRS agreed "to release the Phase II data without taxpayer identification." Pretrial Order. Para. 22, CR 412 at 6. The district court's findings after trial therefore stated that "IRS voluntarily agreed to disclose that [Phase II] data." Finding of Fact No. 17, Petition App., p. 33a. The IRS did not object to this finding.

In addition to voluntarily agreeing to release Phase II data, and admitting this agreement in the Pretrial Order, the IRS actually did release the bulk of the Phase II data on computer dates in July, 1981. CR 412 at 7. The only remaining issue at trial was whether these computer tapes had adequate documentation. The IRS agreed at trial to the inadequacy of this documentation. 825 F.2d at 227-28. Dr. Long requested IRS to provide copies of some Phase II check sheets to assist in interpreting the Phase II tapes IRS had already released.

On appeal in this case, the IRS did not ask to be relieved from its agreement to release Phase II data, nor did it raise any issues concerning the disclosability of the check sheets. IRS simply stated that the trial court's findings "do not deny the Longs access to the [Phase II] check sheets" and the trial court's decision "did not constitute a denial of access to the check sheets." IRS Appellees' Br., No. 84-4117, pp. 30 n. 14 and 31.

Thus, the IRS expressly and voluntarily agreed to release the Phase II check sheet data. The IRS does not state any grounds in the petition for certiorari for equitable relief from its agreement, nor does it allege any "manifest injustice" resulting from the agreement except for

a supposed "administrative burden" in making photocopies.[3] The "burden" of making copies is the same burden that exists in any Freedom of Information Act request. It does not support a finding of "manifest injustice".

Thus, the IRS has no grounds for relief from its voluntary agreement to release Phase II data or for relief from the terms of the pretrial order to which it expressly agreed. The petition for certiorari should be denied.

II. THE IRS PETITION FOR CERTIORARI WAS NOT FILED WITHIN THE JURISDICTIONAL TIME PERIOD ALLOWED BY STATUTE.

The time period for filing a petition for certiorari is 90 days. 28 U.S.C. § 2101(c). The period is jurisdictional and may not be waived, although it is extendable by up to 60 days. *Id.*; Rule 20.3.

In this case the petition was filed on March 30, 1988, after IRS received an extension in February. However, the judgment was entered in August 18, 1987, and the time for filing a petition elapsed on November 16, 1987, in the absence of a timely petition for rehearing of the judgment.

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[3] The IRS greatly exaggerates the photocopying "burden". Petition, p. 7, n.5. The court of appeals pointed this out (596 F.2d at 366):

> [T]he most significant portion of the [expense claimed by the IRS] . . . is the estimate for editing and reproducing all of the 200,000 check sheets. Appellants have indicated, however, that they do not seek all or even most of the check sheets. They are primarily interested in the computer tapes and only seek the check sheets where there is a problem with interpretation of the tapes.

Dr. Long seeks the missing Phase II files not included in the tapes (5, 6 and 7) and a sample of some of the other check sheets to aid in interpretation of the tapes she already received.

The IRS relies (Petition, p. 2) on a rehearing petition filed by Respondents to suspend finality of the August, 1987, judgment and thereby extend the filing deadline, but, as explained below, the Respondents' petition for partial rehearing was in a different appeal and it did not delay the finality of the separate judgment which the IRS seeks to vacate.

A judgment's finality is suspended for purposes of the time period for seeking review when either party files a petition or motion that "seeks an alteration of the rights adjudicated" in the judgment. *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984). A party's request for rehearing or a court's action on a separate judgment, even when arising out of the same case, does not affect the finality of the judgment on which review is sought. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 210-11 (1952).

Here, the court of appeals heard two separate appeals, which were consolidated only for purposes of argument at the same time.[4] Appeal No. 84-4117 covered disclosure of the Phase II data on which the IRS seeks a remand. That appeal was from a final judgment in *Long v. IRS*, No. C75-228C (W.D. Wash.), entered in July, 1984. Respondents' petition for partial rehearing in the court of appeals did not seek any alteration in, or have any effect on, the judgment in appeal No. 84-4117. Respondents' rehearing petition was directed solely at the judgment in a different appeal (Nos. 86-3678 and 86-3679), which arose from a

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[4] The clerk simply sent out a notice dated November 14, 1986, stating the "cases will be argued together."

separate 1986 order in the district court,[5] while the IRS appeal (No. 84-4117) was already pending. The rehearing petition raised no issues pertaining to the judgment in the appeal in No. 84-4117.

The Respondents' petition for partial rehearing in 1987 was thus in a separate appeal, with different issues, arising from a different judgment and involving a different defendant. Therefore, it did not extend the time for a petition for certiorari in the IRS case. The IRS petition was not filed within 90 days and the time had already passed when an extension was sought in February, 1988. There is no jurisdiction over the petition because of this delay and the petition should be denied.

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[5] The district court's 1986 ruling was in *Long v. BEA*, No. C78-176C (W.D. Wash.). A final judgment was entered in June, 1983, in the *BEA* case. That 1983 judgment was reversed at 742 F.2d 1173 (9th Cir. 1984). Meanwhile, the district court had a trial in 1983 and entered judgment in 1984 in the *IRS* case, when the *BEA* appeal was pending. The 1986 district court decision involved only the *BEA* case, since the remand was only from the 1984 judgment of the court of appeals reversing the district court's 1983 judgment in the *BEA* case. The *IRS* appeal, filed in 1984, was pending until the judgment in August, 1987. The two cases were consolidated by the district court for hearing purposes only in December, 1982, but the district court's order expressly left the parties, claims and defenses separate and distinct. The files were consolidated and papers often had both headings, leading to some occasional confusion in the clerk's office. For example, the clerk mistakenly entered a judgment naming IRS in 1986, although the IRS case was not before the district court and was then pending on appeal. The parties have recognized the cases are separate, however, and separate judgments were entered in each case at different times.

III. DISCLOSURE OF TCMP STATISTICAL DATA IS NOT AFFECTED BY THE RECENT DECISION IN CHURCH OF SCIENTOLOGY v. IRS.

The IRS argues that disclosure of check sheets "cannot be reconciled with this Court's decision in *Church of Scientology v. IRS* No. 86-472," 101 S.Ct. 271 (1987). *Scientology* affirmed an *en banc* decision of the D.C. Circuit, 792 F.2d 153 (1986), interpreting 26 U.S.C. § 6103(b)(2) to permit disclosure of tax information when identifying information is deleted and the information is also reformulated. 792 F.2d at 153, 160, 163, quoted in 108 S.Ct. at 273. The Court rejected the Church of Scientology's theory that the 1976 Haskell amendment to § 6103(b)(2) permits it to gain access to any particular taxpayer's file containing protected return information by simply deleting identifiers. 101 S.Ct. at 274-76.

This case does not involve the type of request at issue in *Scientology*. The Phase II statistical data at issue here are exactly the sort of statistical data that are intended to be disclosable under the Haskell amendment.

Senator Haskell stated that the purpose of his amendment was to provide for release of "statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers." 122 Cong. Rec. 24012 (1976), quoted at 101 S.Ct. 275. The IRS agrees the Haskell amendment permits release of information in the form of a statistical tabulation or compilation of data that can no longer be associated with any particular taxpayer. IRS *Scientology Brief*, p. 25, No. 86-472. IRS explained that such compilations are different and can be released because "[d]isclosure of data from a sample generated by

IRS does not pose the same privacy concerns as disclosure of a particular taxpayer's return information, even if redacted, in response to a specific request" such as the Church of Scientology's request. *Id.* at 36-37 n. 13.

The Phase II check sheets here are disclosable under the "reformulation" test affirmed in *Scientology.* The check sheets (P.Ex. 41, pt. 2) do not contain contain item-by-item figures from tax returns, but, rather, summaries of information about the sample of business nonfilers in the survey and information about what tax returns should have been filed. The information is thus reformulated under the standard established in *Scientology,* 792 F.2d at 161-62, and affirmed by this Court.

In 1981, Congress expressly confirmed that the court of appeals was correct in 1979 when it ordered IRS disclosure of Phase II TCMP data to Susan Long.[6] When amending § 6103(b)(2) to deal with certain other TCMP data used in developing audit selection formulas, Congress expressed its agreement with the general holding in *Long v. IRS,* 596 F.2d 362 (9th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980). Congress stated some "doubt has been raised . . . whether the disclosure restrictions cover data derived by the Internal Revenue Service from its Taxpayer Compliance Measurement Program (TCMP)." House Report No. 97-201, 97th Cong., 2d Sess. 238-39 (July 24, 1981). The Committee Report, which proposed the 1981 amend-

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[6] When Congress amends a provision of a statute and in the process expresses its acceptance of a prior judicial interpretation of the statute, that interpretation becomes the legislative intent of Congress. *Bob Jones University v. U.S.,* 461 U.S. 574, 601-02 (1983).

ment to § 6103(b)(2), cited and discussed the 1979 *Long* decision in the Ninth Circuit. *Id.* at n. 2. The Committee explained that § 6103(b)(2) was being amended to permit withholding of some TCMP data used in developing audit selection methods, but otherwise the *Long* decision should remain intact (H. Rep. No. 97-201 at 238-39):

> The committee intends that nothing in this provision [§ 6103(b)(2)] be construed to limit disclosure of statistical data or other information (other than of the type that could be used by IRS to determine criteria for selecting returns for examination) to the extent permitted under present law. Thus, any information that is currently made available will continue to be available.

Thus, Congress in 1981 expressly confirmed that TCMP data are disclosable under § 6103(b)(2), so long as the disclosure does not reveal methods used in the IRS audit selection system. Phase II data were never used for development of audit selection methods and Congress expressed its intent to confirm the result in *Long* with respect to release of such TCMP data. H. Report No. 97-201 at 238-39.

Therefore, the IRS is wrong in maintaining that disclosure of these Phase II check sheets is barred by § 6103 and cannot be reconciled with *Scientology*. A remand for reconsideration is not necessary.

———o———

CONCLUSION

The court of appeals did not err in ordering the IRS to comply with its voluntary agreement, as stated in the pretrial order, to release Phase II check sheets to assist in interpretation of the 23 computer tapes that IRS already released. The petition should be denied.

Respectfully submitted,

STEPHEN KOLDEN STRONG
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May 24, 1988

Supreme Court, U.S.
FILED
JUN 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

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v.

SUSAN B. LONG ET VIR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents contend (Br. in Opp. 7-9) that the petition is jurisdictionally out of time. Their argument rests on the premise that the two appeals decided below "were consolidated only for purposes of argument" (Br. in Opp. 8). Respondents maintain that their petition for rehearing related solely to one of those appeals (Cir. Nos. 86-3678 & 86-3679) and therefore did not toll the time for seeking certiorari from the court of appeals' decision in the other appeal (9th Cir. No. 84-4117). Because it was that latter appeal that involved the TCMP Phase II "check sheets" that are the subject of the petition for certiorari, respondents argue that the petition was required to be filed within 90 days of the issuance of the Ninth Circuit's judgment (at a time when respondents' own rehearing petition was still pending). The premise of respondents' contention is erroneous, and there is no basis for the claim that the petition is out of time.

Although the decision below arises out of what were once two separate appeals from the district court, those "two cases were consolidated on appeal" (Pet. App. 2a). Accordingly, the court of appeals disposed of both appeals in *one* judgment, which listed both appeals in its caption (see *id.* at 13a-14a). It was that single judgment that respondents sought to have reconsidered when they filed their petition for rehearing, and the pendency of that petition necessarily tolled the time to petition from that judgment, regardless of which aspect of the judgment was to be the subject of the certiorari petition. See Sup. Ct. R. 20.4. Indeed, despite respondents' assertion now that their rehearing petition was addressed to only one of the cases on appeal to the Ninth Circuit, respondents themselves listed both appeals in the caption of the rehearing petition, as did the Ninth Circuit in its order denying rehearing (Pet. App. 15a). It is therefore clear that the time to petition for a writ of certiorari from the judgment below did not begin to run until respondents' petition for rehearing was denied on December 3, 1987, and therefore the certiorari petition was timely filed.

2. Respondents contend (Br. in Opp. 5-7) that the petition should be denied because, respondents assert, the government agreed in a pretrial order to release the information at issue, and that agreement is binding. This contention is without merit.

Respondents rely (Br. in Opp. 6) upon paragraph 22 of the pretrial order entered on remand from *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980) (*Long I*), which states that the IRS agreed, in a letter dated July 10, 1981, "to release the Phase II data without taxpayer identification" (C.A. E.R. 32). Respondents also point to one of the district court's findings after trial to the effect that the IRS "voluntarily agreed to disclose that [Phase II] data" (Pet. App. 33a). In

the first place, these references are not to the check sheets at issue here, but to the computer data tapes, which the IRS did in fact release. The check sheets are not referenced in the paragraphs upon which respondents rely.[1] That is why respondents specifically stated in the court of appeals that "the IRS did not agree to release check sheets." 84-4117 Appellees' C.A. Reply Br. 2; see also 84-4117 Appellees' C.A. Br. 20 ("IRS's counsel said the agency had not agreed to release check sheets").

In any event, the agreements to which respondents refer were entered, not "voluntarily" (Br. in Opp. 6), but on remand from *Long I*, and they were addressed to the effect of that decision on the litigation. Whether or not the IRS agreed at that time that *Long I* required the redaction and disclosure of check sheets is quite irrelevant. The Ninth Circuit below held that the redaction and disclosure of check sheets is required by *Long I*, and we do not take issue with that conclusion here. What we do argue here is that *Long I* is a dead letter in light of this Court's explicit rejection of its holding in *Church of Scientology* v. *IRS*, No. 86-472 (Nov. 10, 1987). Therefore, *Long I* should not now be invoked to force the government to violate 26 U.S.C. 6103 and release private information of a type that this Court has just concluded is required by statute to be kept confidential. See Pet. 6-8.

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[1] The July 10, 1981, letter that is referred to in the pretrial order indicates only that the IRS would turn over a sanitized copy of the Phase II data tapes, and that letter was in response to respondents' motion for partial summary judgment seeking disclosure only of certain TCMP data tapes (see Civ. No. C75-228M Defendant's Mem. in Opp. to Plaintiffs' Motion for Partial Summary Judgment 5-6 & Exh. D). The district court's finding relied upon by respondents refers to the "Phase II data tapes produced on July 15, 1981," *i.e.*, the tapes released in accordance with the July 10, 1981, letter, and to "other documents that are being released," which, of course, does not include the check sheets since they have not been released (see Pet. App. 33a).

3. Respondents argue (Br. in Opp. 10-12) that the check sheets ordered disclosed by the court of appeals are not covered by this Court's decision in *Church of Scientology* because they constitute "statistical data" of the sort that everyone agrees is discloseable under the Haskell Amendment. This contention is wholly without foundation.

It is undisputed that the unedited check sheets at issue contain information identifying individual taxpayers and information taken from their tax returns, along with corrected financial data derived from auditing the returns. The check sheets contain raw tax data, and they do not constitute merely a statistical analysis or "reformulation" (Br. in Opp. 11) of those data.[2] The check sheets therefore plainly are tax "return information" under 26 U.S.C. 6103(b), and, because they contain identifying information, they clearly are not excluded from that definition by the Haskell Amendment. This simple fact was recognized even by the court of appeals, which ordered the check sheets disclosed *only after redaction,* on the erroneous belief that such redaction brings otherwise confidential return information within the exclusion of the Haskell Amendment. See Pet. App. 5a; *Long I.* Now that this Court has made clear that there is "no duty under the FOIA to undertake such redaction" because "removal of identification from return information would not deprive it of protection under § 6103(b)" (*Church of Scientology,*

[2] The TCMP program, of course, does generate a considerable amount of statistical analysis, but those statistics are not what is at issue here. "[A]ll statistical tabulations based on the TCMP" were disclosed to respondents even before the decision in *Long I* (see *Long I,* 596 F.2d at 364 (footnote omitted)). The continuing litigation has been about the disclosure of source material for the TCMP, such as check sheets.

slip op. 8-9), there is no basis for ordering disclosure of the confidential return information embodied in the check sheets.[3]

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for reconsideration in light of this Court's decision in *Church of Scientology* v. *IRS,* No. 86-472 (Nov. 10, 1987).

Respectfully submitted.

CHARLES FRIED
Solicitor General

JUNE 1988

[3] Respondents assert (Br. in Opp. 11-12) that, in amending Section 6103 in 1981, Congress "expressly confirmed that the court of appeals was correct in 1979 when it ordered IRS disclosure of Phase II TCMP data to Susan Long." This argument, which is a direct attack on this Court's holding in *Church of Scientology,* is plainly without foundation. In 1981, Congress simply acted to ensure that information that is used to develop standards for auditing tax returns would not be discloseable, no matter what interpretation was given to the existing language of the Haskell Amendment by the courts. Congress neither confirmed nor rejected the general construction given to the Haskell Amendment in *Long I.* See generally H.R. Conf. Rep. 97-215, 97th Cong., 1st Sess. 264 (1981); H.R. Rep. 97-201, 97th Cong., 1st Sess. 238 n.2, 239 (1981).

U.S. GOVERNMENT PRINTING OFFICE 1988—202 037 60510